

I. Factual and Procedural Background

1 The facts as alleged in the complaint are as follows: on August
2 24, 2004, Plaintiffs entered into a promissory note ("the First
3 Note") secured by the property located at 3018 Panache Street in Las
4 Vegas, Nevada. On May 12, 2006, Plaintiffs obtained a second loan
5 on the property, from Countrywide. On June 6, 2009, Recontrust
6 recorded a Notice of Default and Election to Sell ("NOD") with
7 respect to the First Note. On or about September 9, 2009,
8 Recontrust Company recorded a Notice of Trustee's Sale ("NOS").
9 Nevertheless, the trustee's sale never took place.

10 On or around November 15, 2009, Plaintiffs received a call
11 regarding their second loan. The caller purported to be acting on
12 behalf of Countryside and sought information relating to the second
13 note and second deed of trust, and asked if someone had worked with
14 Plaintiffs on obtaining a loan modification. When Plaintiffs
15 further questioned the caller, she claimed to be representing an
16 insurance company that received a loss claim from Countrywide
17 regarding Plaintiffs' second loan.

18 On April 13, 2010, Plaintiffs filed a lawsuit in state court.
19 On May 20, 2010, Defendants removed (#1) the lawsuit to our court,
20 invoking our diversity jurisdiction. On May 27, 2010, Defendants
21 filed a request for judicial notice (#12) and a motion to dismiss
22 (#13). Plaintiffs opposed (#17) the motion to dismiss and,
23 Defendants replied (#27).

24 On June 7, 2010, Plaintiffs filed a counter-motion (#15) for
25 summary judgment seeking to quiet title against Defendant Lawyers
26 Title of Nevada Inc. ("LTN") and to prevent LTN from foreclosing on
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1 Plaintiffs' home.¹ LTN did not oppose the motion. Pursuant to our
2 Order (#29) approving a stipulation (#28) of the parties, LTN is no
3 longer a defendant in this case.

4 5 II. Motion to Dismiss Standard

6 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be
7 granted if the complaint fails to "state a claim to relief that is
8 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
9 570 (2007). On a motion to dismiss, "we presum[e] that general
10 allegations embrace those specific facts that are necessary to
11 support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,
12 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889
13 (1990)) (alteration in original). Moreover, "[a]ll allegations of
14 material fact in the complaint are taken as true and construed in
15 the light most favorable to the non-moving party." In re Stac
16 Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation
17 omitted).

18 Although courts generally assume the facts alleged are true,
19 courts do not "assume the truth of legal conclusions merely because
20 they are cast in the form of factual allegations." W. Mining
21 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
22 "[c]onclusory allegations and unwarranted inferences are
23 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
24 F.3d at 1403 (citation omitted).

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27 ¹ Plaintiffs' counter-motion was filed in response to LTN's
28 motion for summary judgment, filed May 21, 2010 in state court.

1 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
2 normally limited to the complaint itself. See Lee v. City of L.A.,
3 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
4 materials outside the pleadings in making its ruling, it must treat
5 the motion to dismiss as one for summary judgment and give the non-
6 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
7 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
8 court may, however, consider certain materials – documents attached
9 to the complaint, documents incorporated by reference in the
10 complaint, or matters of judicial notice – without converting the
11 motion to dismiss into a motion for summary judgment." Ritchie, 342
12 F.3d at 908.

13 If documents are physically attached to the complaint, then a
14 court may consider them if their "authenticity is not contested" and
15 "the plaintiff's complaint necessarily relies on them." Lee, 250
16 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
17 A court may also treat certain documents as incorporated by
18 reference into the plaintiff's complaint if the complaint "refers
19 extensively to the document or the document forms the basis of the
20 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
21 adjudicative facts or matters of public record meet the requirements
22 of Fed. R. Evid. 201, a court may judicially notice them in deciding
23 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A
24 judicially noticed fact must be one not subject to reasonable
25 dispute in that it is either (1) generally known within the
26 territorial jurisdiction of the trial court or (2) capable of
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1 accurate and ready determination by resort to sources whose accuracy
2 cannot reasonably be questioned.").

3 4 III. Discussion

5 A. Quiet Title

6 The first claim in Plaintiffs' Complaint is quiet title. A
7 quiet title action is the proper method by which to adjudicate
8 disputed ownership of real property rights. See Howell v. Ricci,
9 197 P.3d 1044, 1046 n.1 (Nev. 2008). Though not properly a cause of
10 action, an action to quiet title is an equitable proceeding in which
11 a party seeks to settle a dispute over ownership of property or to
12 remove a cloud upon his title to the property. MacDonald v. Krause,
13 362 P.2d 724 (Nev. 1961). Although this has not been explicitly
14 addressed by the Nevada Supreme Court, a widely accepted rule in
15 such actions is that the party must tender the undisputed amount due
16 and owing to challenge the validity of a sale or title to the
17 property. See, e.g., Abdallah v. United Savings Bank, 43 Cal. App.
18 4th 1101, 1109 (1996). In essence, under the tender rule, he who
19 seeks equity must do equity. See McQuiddy v. Ware, 87 U.S. 14, 19
20 (1873). Indeed, the issue of tender was a factor considered by the
21 Nevada Supreme Court when it ruled in favor of a party challenging a
22 sale on their property due to past due taxes. Provenzano v. Clark
23 County, 319 P.2d 855, 857 (Nev. 1957) ("Plaintiff's action was to
24 quiet title to the property involved, accompanied by a tender to pay
25 all taxes.").

26 With respect to the issue of tender, Plaintiffs allege that
27 "Countrywide and BOA, on information and belief, have been paid for
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1 their Second Note and Second Trust Deed through an insurance claim.”
2 (Compl. § 41 (#1).) Plaintiffs also allege that by “bundling the
3 First Note and selling it [Defendants] have been paid for the
4 underlying obligation.” (Id. § 38.) These allegations are not only
5 conclusory and lacking in factual support, they are also not
6 tantamount to an allegation that Plaintiffs have tendered the amount
7 owed on their mortgages. Plaintiffs’ first claim will therefore be
8 dismissed.

9 B. Contractual Breach of the Implied Covenant of Good Faith and
10 Fair Dealing

11 Plaintiffs’ second claim is for breach of the implied covenant
12 of good faith and fair dealing. In every contract, there is an
13 implied covenant of good faith and fair dealing: “When one party
14 performs a contract in a manner that is unfaithful to the purpose of
15 the contract and the justified expectations of the other party are
16 thus denied, damages may be awarded against the party who does not
17 act in good faith.” Hilton Hotels Corp. v. Butch Lewis Prods.,
18 Inc., 808 P.2d 919, 923 (Nev. 1991). A breach of the covenant
19 occurs “[w]here the terms of a contract are literally complied with
20 but one party to the contract deliberately contravenes the intention
21 and spirit of the contract” Id. at 922-23.

22 In this case, Plaintiffs do not allege facts that would
23 establish that the manner in which Defendants complied with the
24 contracts at issue – the promissory notes and deeds of trust –
25 contravened the intention or spirit of the contracts. Plaintiffs
26 allege that Defendants failed to provide adequate notice when
27 initiating foreclosure proceedings, failed to adequately negotiate a
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1 loan modification and failed to inform Plaintiffs about the
2 insurance claim. The manner in which Defendants conducted
3 themselves with respect to modification of Plaintiffs' loans and
4 foreclosure on Plaintiffs' house is irrelevant to the issue of
5 whether or not Defendants deliberately contravened the intention and
6 spirit of the initial loan contracts. Moreover, Plaintiffs allege
7 no facts regarding the specific nature of the referenced insurance
8 claim. Therefore, it is impossible to evaluate the import of this
9 alleged insurance claim with respect to this claim for relief.
10 Thus, Plaintiffs' claim for breach of the implied covenant of good
11 faith and fair dealing will be dismissed.

12 C. Declaratory Relief: Lacks Standing to Foreclose on First
13 Deed of Trust

14 Plaintiff's third claim seeks declaratory relief under Nev.
15 Rev. Stat. § 30.040 that "MERS and any of its agents, successors or
16 assigns lacks standing to foreclose on the Property because they
17 have no rights under the First Note." (Compl. ¶ 62 (#1-4).) Nev
18 Rev. Stat § 30.040 provides as follows:

19 Any person interested under a deed, written contract or other
20 writings constituting a contract, or whose rights, status or
21 other legal relations are affected by a statute, municipal
22 ordinance, contract or franchise, may have determined any
23 question of construction or validity arising under the
instrument, statute, ordinance, contract or franchise and
obtain a declaration of rights, status or other legal
relations thereunder.

24 NEV REV. STAT § 30.040.

25 Plaintiffs' position with respect to MERS's inability to
26 foreclose is grounded in two theories: First, Plaintiffs claim that
27 although MERS is listed under the First Deed of Trust as the
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1 mortgagee and nominee for the lender, MERS is not "listed anywhere
2 on the First Note or even referred to in the First Note." (Compl. ¶
3 57 (#1-4).) Thus, unless MERS can "produce evidence of a legal
4 right under the First Note, they cannot foreclose on the First Trust
5 Deed." (Id. ¶ 59.) Second, Plaintiff claims that "the Lender has
6 already been paid on the First Note, when the First Note was bundled
7 with other notes and sold as mortgage-backed securities." (Id. ¶
8 60.) We will examine each contention in turn.

9 Under Plaintiff's deed of trust, MERS is designated as the
10 nominee for the original lender, Republic Mortgage, LLC. (RJN, Ex.
11 A at 2 (#12-1).) MERS is also designated as the beneficiary "solely
12 as nominee for Lender and Lender's successors and assigns" (Id. at
13 2 (#12-1).) As many courts have noted, however, "calling MERS a
14 'beneficiary' is both incorrect and unnecessary." Weingartner v.
15 Chase Home Finance, LLC, --- F. Supp. 2d ----, No. 2:09-cv-02255,
16 2010 WL 1006708 at *2 (D. Nev. 2010). It is unnecessary because, in
17 Nevada, the beneficiary is not the only entity that can record the
18 notice of breach and election to sell. NEV. REV. STAT. §
19 107.080(2)(b). The trustee or "other person authorized to make the
20 sale under the terms of the trust deed" may make the sale. Id. §
21 107.080(4). There is therefore no need for any "beneficiary" to
22 make the sale.

23 MERS, as the nominee of the lender, has authority to act on
24 behalf of the holder of the promissory note as to administration of
25 the deed of trust, which includes the authority for substitution of
26 trustees. Id. Moreover, there is a near consensus among district
27 courts in this circuit that while MERS does not have standing to
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1 foreclose as a beneficiary, because it is not one, it does have
2 standing as an agent of the beneficiary where it is the nominee of
3 the lender, who is the true beneficiary. Weingartner, --- F. Supp.
4 2d ----, 2010 WL 1006708 at *2; See also Pantoja v. Countrywide Home
5 Loans, Inc., 640 F. Supp. 2d 1177, 1190 (N.D. Cal. 2009); Lane v.
6 Vitek Real Estate Industries Group, --- F. Supp. 2d ----, No.
7 2:10-335, 2010 WL 1956707 (E.D. Cal. 2010).

8 A possible defect in foreclosure remains "when a note has been
9 negotiated, and there is no evidence that the foreclosing trustee is
10 the nominee of the current holder or that the foreclosing trustee
11 was substituted by a nominee of the current holder." Weingartner,
12 --- F. Supp. 2d ----, 2010 WL 1006708 at *2. Plaintiffs' theory,
13 however, is not based on such a defect. Indeed, Plaintiffs do not
14 contend that Recontrust was not properly substituted as trustee by
15 MERS. Rather, Plaintiffs' theory appears to be based on the
16 circumstance that MERS is listed on the security instrument, but not
17 on the promissory note itself. We have not discovered, nor have
18 Plaintiffs provided, any authority indicating that the scope of
19 MERS' agency must be apparent on the face of the promissory note.
20 Indeed, such a circumstance would be anomalous at best. A deed of
21 trust is a security instrument. It follows the promissory note and
22 generally functions as an agency contract as between MERS and the
23 lender. See id. at 3. Plaintiffs' theory thus fails.

24 Plaintiff's second theory – that "the Lender has already been
25 paid on the First Note, when the First Note was bundled with other
26 notes and sold as mortgage-backed securities" (Compl. ¶ 60 (#1-4)) –
27 likewise fails. Plaintiffs do not allege facts supporting their
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1 claim that their promissory notes were bundled with other notes and
2 sold as mortgage-backed securities, and they fail to explain how
3 that activity would lead to the conclusion that their particular
4 loan was paid off. Plaintiffs' third claim will therefore be
5 dismissed.

6 D. Declaratory Relief

7 Plaintiffs' fourth claim also seeks declaratory relief under
8 Nev. Rev. Stat. § 30.040. Specifically, Plaintiffs seek declaratory
9 relief that: (1) the "Trust Deeds are worthless pieces of paper";
10 (2) the "obligation under the First Note has been satisfied by its
11 sale as a mortgage-backed security"; (3) the "obligations under the
12 Second Note has been satisfied by the collection of the insurance
13 proceeds by Countrywide"; and (4) "no Defendant has authority to
14 foreclose because of failure to provide adequate notice under NRS §
15 107.080, NRS § 107.085 and NRS § 107.086." (Compl. ¶ 66 (#1-4).)

16 Plaintiff has not provided, nor have we discovered, any legal
17 or factual support in favor of the first three proposition. There
18 does, however, appear to be factual and legal support in favor of
19 the fourth to the extent the notice defect is premised on a
20 violation of Nev. Rev. Stat. 107.085(3)(b).² Indeed, it appears
21 that the NOS may have been deficient with respect to form.³ Nev.
22 REV. STAT. § 107.085(3)(b); (NOS, Ex. F (#12-1).) Therefore, we will

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25 ² Plaintiffs allege no facts in support of a violation of Nev.
Rev. Stat. § 107.080 or Nev. Rev. Stat § 107.086.

26 ³ Plaintiffs also allege that the NOD does not comply with Nev.
27 Rev. Stat. § 107.085(3)(b). Section 107.085, however, applies only
to notices of sale.

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1 deny Defendants' motion to dismiss with respect to this claim to the
2 extent the claim is premised on deficiencies in the NOS.

3 E. Injunctive Relief

4 Plaintiffs' fifth claim requests injunctive relief enjoining
5 Defendants' foreclosure. As discussed above, the NOS does not
6 appear to comport with Nevada's statutory requirements. Therefore,
7 we will deny Defendants' motion to dismiss with respect to
8 Plaintiffs' request for injunctive relief to the extent the
9 injunctive relief is premised on deficiencies in the NOS.

10 F. Counter-Motion

11 Plaintiffs' counter-motion for summary judgment (#15) seeks to
12 quiet title against LTN and asks for declaratory relief that LTN
13 can't foreclose on Plaintiffs' property. The motion (#15) is moot
14 in light of our order (#29) granting the parties' stipulation of
15 dismissal of LTN, and will be denied on that basis.

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17 **IV. Leave to Amend**

18 Under Rule 15(a) leave to amend is to be "freely given when
19 justice so requires." In general, amendment should be allowed with
20 "extreme liberality." Owens v. Kaiser Found. Health Plan, Inc., 244
21 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission
22 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors
23 such as undue delay, bad faith, dilatory motive, undue prejudice or
24 futility of amendment are present, leave to amend may properly be
25 denied in the district court's discretion. Eminence Capital, LLC v.
26 Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003).

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1 In light of the liberal spirit of Rule 15(a), Plaintiffs will
2 be given leave to amend the claims dismissed by this Order. If the
3 amended complaint is similarly deficient, however, we may be forced
4 to conclude that further leave to amend would be futile. Moreover,
5 if Plaintiffs choose not to amend the complaint this lawsuit will
6 continue with respect to the claims not dismissed by this Order.

7 8 **V. Conclusion**

9 Plaintiffs' first claim for quiet title fails because
10 Plaintiffs do not allege that they have tendered the amount owed on
11 their mortgages. Plaintiffs' second claim for breach of the
12 implied covenant of good faith and fair dealing likewise does not
13 survive the present motion to dismiss because Plaintiffs allege no
14 facts in support of the claim. Plaintiffs' third claim for
15 declaratory relief does not pass muster; it is based on two
16 untenable theories. Plaintiffs' fourth claim for declaratory relief
17 survives the present motion to dismiss to the extent the claim is
18 premised on deficiencies in the NOS. The record supports he
19 proposition that the NOS did not conform to Nevada's statutory
20 requirements. Finally, Plaintiffs' fifth claim, which requests
21 injunctive relief enjoining Defendants from foreclosing on their
22 property, survives the pending motion to dismiss to the extent it is
23 based on the aforementioned deficiencies in the NOS. Plaintiffs
24 will be given leave to amend their complaint.

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26 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendants' motion to
27 dismiss (#13) is **GRANTED** in part and **DENIED** in part on the following
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1 basis: The motion is granted with respect to Plaintiffs' first,
2 second and third claims. With respect to Plaintiffs' fourth and
3 fifth claims, the motion is denied only to the extent Plaintiffs'
4 claim is based on deficiencies in the notice of sale. The motion is
5 granted in all other respects.

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7 IT IS FURTHER ORDERED THAT Plaintiffs' counter-motion for
8 partial summary judgment (#15) is DENIED as moot.

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10 IT IS FURTHER ORDERED THAT Defendants' "motion for Hearing re
11 13 motion to Dismiss" (#31) is DENIED as moot.

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14 DATED: December 9, 2010.

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16 UNITED STATES DISTRICT JUDGE
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